United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

3-2

75-7074

United States Court of Appeals

SECOND CIRCUIT

EL MESON ESPANOL,

Plaintiff-Appellant,

—against—

NYM CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Statement

This is an action for alleged libel. Judge Charles L. Brieant, Jr. dismissed the complaint on the appellee's motion for summary judgment by memorandum and order dated December 27, 1974 on the ground that the matter complained of was not libelous *per se* (6a-11a).*

The complaint contains two alleged causes of action although there is only one real grievance. Damages in the amount of one-half a million dollars are demanded (28a-38a).

* References are to the pages in the Appendix.

The offending matter consists of three sentences in a long article by Thomas Plate entitled "Coke: The Big New Easy-Entry Business," which was published in the issue dated November 5, 1973 of NEW YORK Magazine and which reads as follows:

> "They are still out there across the Hudson River, too—in Elizabeth, in West New York, in Union City. Late at night in Union City, bars like El Tropicano at 49th Street and Hudson Avenue and restaurants like El Meson Espanol at 4018 Bergen Line Avenue become good places to meet a connection. Park your car some night in front of one of them, turn off all the lights, and focus your binoculars on a big Cadillac El Dorado with Miami plates, or, if you're lucky, a nice Lincoln with diplomatic plates. A great tourist attraction, that Union City" (37a).

The answer admits publication of the offending matter, but denies the allegations of defamation, malice and damage in both causes of action. Two affirmative defenses and one partial defense are pleaded. The first affirmative defense alleges that the complaint fails to state a claim on which relief may be granted and the second alleges that the offending matter was and is true in all material and substantial respects (39a-42a).

On the motion for summary judgment, Thomas Plate, the author of the offending article in an affidavit stated that in September 1973, accompanied by a Special Agent of the Drug Enforcement Administration of the Department of Justice of the United States Government, he visited the premises, 4018 Bergenline Avenue, Union City, New Jersey and other places in New Jersey mentioned in the

article and on another occasion during the month of September 1973, he visited said places alone (15a). He objected, in response to certain interrogatories, to identifying the agent by name asserting confidentiality provided for by Section 79-h of the Civil Rights Law of the State of New York (14a-15a).

The learned Court below held that no special damages were pleaded and that the offending matter was not libelous *per se* (7a). The appellant apparently concedes that no special damages are pleaded since its brief is silent on this issue. It argues at length that a corporation may be libeled. No one denies this but it should be pointed out that a corporation can only be the subject of a business libel since it cannot lie awake nights grieving nor can it be shunned or avoided.

ARGUMENT

POINT I

The offending matter is not libelous *per se*.

The offending matter does not demean the plaintiff corporation, it merely states that its restaurant is a good place "to meet a connection." When the reference is to an inanimate object, courts have uniformly held that the matter is not libelous *per se* and that there can be no recovery unless the plaintiff can show that the article charges the owner of the inanimate object with some disreputable conduct. The proprietor of a restaurant has no control over its patrons and cannot refuse to serve them so long as they are not drunk or disorderly. This type of reference has uniformly been held not libelous.

Beginning with *Kennedy* v. *Press Publishing Co.*, 41 Hun 422 (1886) through *Stillman* v. *Paramount Pictures Corp.*, 2 A.D.2d 18, aff'd 5 N.Y.2d 994 (1959), the courts of New York have uniformly supported this thesis.

In *Kennedy*, the article charged that the plaintiff's saloon in Coney Island was a resort for improper characters and that the influence there was bad.

In *Bosi* v. *New York Herald Co.*, 33 Misc. 622, aff'd 58 App. Div. 619 (First Dept. 1901), the defendant charged that the plaintiff's boarding house was a resort favored by New York anarchists.

In *Maglio* v. *New York Herald Co.*, 93 App. Div. 546 (Second Dept. 1904), the article charged that the Roma Hotel kept by Constantino Maglio was harboring a murderer.

In *Richman* v. *New York Herald Tribune, Inc.*, 7 Misc. 2d 563 (1957), the article charged that one could die in the plaintiff's proprietary hospital, Manhattan General Hospital, while personnel wrangled over the qualifications of an emergency patient.

Finally, *Stillman* v. *Paramount Pictures Corp.*, 2 A.D.2d 18, aff'd 5 N.Y.2d 994 (1959), reached the same conclusion. In this case, the defendants produced a motion picture entitled "The Country Girl" featuring an actress by the name of Grace Kelly who has achieved greater prominence since the film. Part of the dialogue in the motion picture had an actor stating that he could go to "Stillman's Gymnasium and get a punch-drunk fighter." The Appellate Division held that the reference was to the gymnasium and not to the plaintiff and hence not libelous.

Since the reference at bar is to the plaintiff's restaurant, bar and grill, and not to the plaintiff, it is similar to the reference to a Coney Island saloon (*Kennedy*), a boarding house (*Bosi*), a hotel (*Maglio*), a proprietary hospital (*Richman*), and a gymnasium (*Stillman*).

The appellant seeks to avoid the impact of these cases by quoting from a New Jersey Statute which makes it unlawful "for any person; (6) knowingly to keep or maintain . . . any place whatsoever, which is resorted to by persons using controlled, dangerous substances in violation of this act for the purpose of using such substances or which is used for the keeping or selling of the same in violation of this act" and concludes that the article charged the appellant corporation of having committed a crime.

There is not a single word in the article which suggests that the proprietor of the plaintiff's restaurant had any knowledge that persons who congregated in its restaurant found it a good place "to meet a connection." In short, the appellant complains of matter which the appellee did not publish.

POINT II

There is no allegation of special damage.

When the offending matter is not libelous *per se*, the complaint is defective in the absence of an allegation of special damage and there is none here. Indeed, there seems to be conceded since the Appellant makes no such claim in its brief.

The best statement of the rule is found in *O'Connell* v. *Press Publishing Company*, 214 N.Y. 352, 358 (1915):

> " . . . the facts showing [special] damage must be fully and specifically set forth in the complaint. General allegations of damage are not sufficient."

Even earlier the New York Court of Appeals had pointed out that special damages must be pleaded with particularity. *Reporters' Association* v. *Sun Printing and Publishing Association,* 186 N.Y. 437, 442 (1906):

> "The disagreement of the Appellate Division, in this case, was upon the question of the special damage alleged. That special damage must be alleged, the article not being libelous *per se,* was conceded; but the dissent was from the opinion that the allegation was sufficient, that the publication etc. 'has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract and has greatly damaged the plaintiff in credit and reputation.' Under the settled rule, whenever special damage is claimed, the plaintiff must state it with particularity, in order that the defendant may be enabled to meet the charge. (1 Chitty on Plead. 414; Newell on Slander & Libel, 634; *Linden* v. *Graham,* 1 Duer, 670; *Bassil* v. *Elmore,* 65 Barb. 627; *Cook* v. *Cook,* 100 Mass. 194).
>
> "In *Linden* v. *Graham,* (*supra*), it was said of an action of slander, (and the same rule would apply), that 'the special damage must be fully and accurately stated. If the special damage was a loss of customers * * * the persons who ceased to be customers, or who refused to purchase, must be named; and that, if they are not named, no cause of action is stated. (1 Selden, 14; *Kendall* v. *Stone*).'"

An allegation of even money on its face is utterly incompatible with a claim for special damages. *Tower* v. *Crosby*, 214 App. Div. 392, 393 (4th Dept. 1925); *Drug Research Corporation* v. *Curtis Publishing Co.*, 7 N.Y.2d 435, 441 (1960):

> "The damage claimed is $5,000,000. Such round figures, with no attempt at itemization, must be deemed to be a representation of general damages (see Seelman, Law of Libel and Slander in the State of New York [1933], p. 388)."

See *Leather Developments Corp.* v. *Dun & Bradstreet, Inc.*, 15 A.D.2d 761 (1st Dept. 1962) citing *Drug Research.*

There are no special damages pleaded by the Appellant.

POINT III

Summary judgment was properly granted.

There has been a marked tendency in recent years to dispose of libel litigation summarily where it appears from the face of the pleadings that the plaintiff cannot succeed. *Shapiro* v. *Health Insurance Plan of Greater New York*, 7 N.Y.2d 56 (1959); *Sheridan* v. *Crisona*, 14 N.Y.2d 108 (1964); *Schneph* v. *New York Post Corporation*, 16 N.Y.2d 1011 (1965); *Droner* v. *Schapp*, 34 A.D.2d 823 (2nd Dept. 1970); *Fotochrome, Inc.* v. *New York Herald Tribune, Inc.*, 61 Misc. 2d 226 (1969); *All Diet Foods Distributors, Inc.* v. *Time Inc.*, 56 Misc. 2d 821 (1967).

CONCLUSION

It is our respectful submission that the order of the District Court granting summary judgment to the appellee and dismissing the complaint should be affirmed with costs.

Dated: March 21, 1975

Respectfully submitted,

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Index No.

AFFIDAVIT OF SERVICE BY MAIL

ATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

ponent is not a party to the action, is over 18 years of age and resides at

139 E. 33rd St., New York, N.Y. 10016

That on the 24 *day of* March *19* 75 *deponent served the annexed*

Appellee's Brief

Lawrence Lauer, Esq.

orney(x) for Plaintiff-Appellant

this action at 36 West 44th Street, New York, N.Y. 10036

address designated by said attorney(x) for that purpose by depositing a ~~true~~ two copy of same enclosed a postpaid properly addressed wrapper, in — ~~x~~ — official depository under the exclusive care d custody of the United States post office department within the State of New York.

orn to before me

is 24 *day of* March *19* 75

Elaine M Postley

ELAINE M. POSTLEY
Notary Public, State of New York
No. 31-8[illegible]735
Qualified in New York County
Commission Expires March 30, 1976

Shirley S. Einhorn

The name signed must be printed beneath

Shirley S. Einhorn

C 321—Affirmation of Service by Mail.
Affidavit of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

.....

The name signed must be printed beneath

Receipt is acknowledged
of 2 copies of the
within appellee's brief
March 23 1975.

Attorney for the appellee

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